No. 13109

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARY NEIL and WILLIAM P. NEIL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

Jurisdictional Statement.

This is an appeal from a judgment at law of the United States District Court for the Southern District of California, Central Division, in favor of the defendant, United States of America, to the effect that plaintiffs recover nothing by their respective complaints for refunds of federal income taxes. [Tr. pp. 5-6, 13-33.]

The District Court for the Southern District of California has jurisdiction of the actions under the provisions of Section 1331 of the Judicial Code.

The plaintiffs, who are husband and wife [Tr. pp. 17-25], filed separate actions, which were consolidated for trial. [Tr. pp. 32-33.]

The amount in controversy is $5,181.78, together with interest as provided by law from March 15, 1947. [Tr. pp. 5-13.]

The pleadings necessary to show the jurisdiction of the District Court are the Complaints [Tr. pp. 3-8 and 11-13] and the Stipulation of Facts. [Tr. p. 17.]

The United States Court of Appeals for the Ninth Circuit has jurisdiction under Sections 1291-1294 of the Judicial Code.

The judgment of the District Court was entered on the 7th day of June, 1951. [Tr. p. 33.] On the 30th day of July, 1951, plaintiffs filed their notice of appeal. [Tr. p. 46.] An order extending plaintiffs' time to file the record on appeal to and including the 9th day of October, 1951, was filed on the 4th day of September, 1951. [Tr. p. 50.] The original transcript of record on appeal was certified by the Clerk of the District Court on the 21st day of September, 1951 [Tr. p. 51], and was filed in the Office of the Clerk of this Court on the 24th day of September, 1951.

Statement of the Case.

The facts herein were stipulated. [Tr. pp. 17-24.]

Appellants were, and are, husband and wife, residing and having their principal place of business in the County of Los Angeles, State of California. All taxable income of appellants for the year 1946 was community income. [Tr. p. 17.]

At all times during the period from July 1, 1943, to October 31, 1949, Harry C. Westover was the Collector of Internal Revenue for the Sixth District of California. [Tr. p. 18.]

Appellants filed their separate original income tax returns for the calendar year 1946 on March 15, 1947, in the Sixth District of California. Appellants reported upon their returns, a total of $28,568.21 as income from the partnership of "Le Roy D. Owen Co." [Tr. p. 18; Exs. 1-2.]

At all times during the period from December 1, 1943, to September 30, 1946, William P. Neil and Le Roy D. Owen were partners in a real estate brokerage business under the name of "Le Roy D. Owen Company"; Le Roy D. Owen being the only general partner, and William P. Neil being the only limited partner. At all times during the life of the partnership, the assets and books were in custody of Le Roy D. Owen. [Tr. pp. 18-19.]

At no time was the said partnership licensed to do a real estate brokerage business by the Division of Real Estate of California, but Le Roy D. Owen held an indi-

vidual real estate broker's license to do business as "Le Roy D. Owen Co.," and transacted the real estate brokerage business of the partnership under such individual license. [Tr. p. 19.] During the year 1946, approximately 95% of the income of the partnership was from commissions on real estate sales. [Tr. p. 25.]

All of the partnership capital was contributed by William P. Neil during the years 1943 and 1944, and his entire capital contribution was returned to him by the partnership prior to September 30, 1946 [Tr. p. 19], upon which date the partnership was dissolved. [Tr. p. 21.]

A delinquent partnership income tax return for the calendar year 1946 was filed in the Sixth District of California on February 18, 1949, by William P. Neil, showing the net income of the partnership for the year 1946 to be $63,719.67, which is in agreement with the partnership books. [Tr. p. 20, Ex. 4.] Upon the said partnership income tax return, the partner's share of the net income was reported as follows: Le Roy D. Owen, $44,263.28; William P. Neil, $19,456.39. [Ex. 4.]

The only distributions of income by the partnership to William P. Neil at any time were as follows [Tr. pp. 21-22]:

Date	Type and	Amount
September 11, 1946	Cash,	$ 1,007.00
November 21, 1946	Cash,	3,505.87
November 21, 1946	Stocks, at cost to partnership	23,358.59
	Total	$27,871.46

The foregoing amount of $27,871.46 was reported as net taxable distributive income of William P. Neil upon the partnership income tax return filed in the Sixth District of California as follows [Tr. p. 20, Ex. 4]:

Year		Amount
1943	Loss,	$ 303.35
1944	Income,	1,809.14
1945	Income,	6,909.28
1946	Income,	19,456.39
	Total Net Income	$27,871.46

Appellants reported as net taxable income from the partnership upon their individual income tax returns, the following [Tr. pp. 18-20; Ex. 4]:

Year	Amount
1943-1944-1945	$ 8,415.07
1946	28,568.21
Total Net Income	$36,983.28

The excess of the total partnership net income reported upon the individual income tax returns of appellants, and income taxes paid thereon [Tr. p. 18], over the total distributions of income by the partnership to appellants is as follows:

Total share of partnership net income reported by appellants,	$36,983.28
Total share of partnership net income received by appellants,	27,871.46
Excess partnership income reported by appellants; income tax thereon paid by appellants	$ 9,111.82

Claims for refunds of individual income taxes were filed by appellants on May 13, 1949, and May 15, 1949, in the Sixth District of California. [Tr. p. 23.] Said claims for $2,590.89 by each appellant were based entirely upon the fact that partnership net income of appellants for the year 1946 had been incorrectly reported, and taxes paid thereon, upon the original income tax returns filed by appellants to the extent of $9,111.82. [Exs. 7-8.]

On March 7, 1947, William P. Neil filed a complaint against Le Roy D. Owen for money due on contract in the Superior Court of the State of California in and for the County of Los Angeles, alleging that said defendant owed him $5,360.38, plus an interest in certain contingent commissions receivable. The complaint was based upon a certain alleged oral agreement between the parties entered into on November 21, 1946, for the division of the assets of the partnership (Le Roy D. Owen Company) remaining in the possession of Le Roy D. Owen. [Ex. 5, pp. 1-6.] Thereafter, various demurrers being sustained by Judges Scott, Barnes and Ashburn to the original complaint and three amended complaints [Ex. 5], finally upon February 7, 1949, judgment was entered in favor of defendant, Allen W. Ashburn, Judge, ruling that the third amended complaint failed to state a cause of action. Plaintiff appealed and on October 4, 1949, the parties dismissed the appeal after payment of $1000 by defendant Owen to plaintiff Neil. [Tr. p. 22.]

Pleadings and Proceedings Herein.

The respective complaints of appellants for recovery of taxes illegally assessed and collected were filed on August 4, 1950. The complaints alleged the assessment and the payment of the 1946 income taxes to Harry C. Westover as Collector of Internal Revenue on or about March 15, 1947; filing of refund claims with the said Collector on or about May 15, 1949; that no part of said refunds had been made; that six months had elapsed since the filing of the refund claims. Copies of the respective refund claims were attached to the respective complaints as Exhibits "A" thereof. In each complaint, the plaintiff asked for judgment in the sum of $2,590.89, with interest as provided by law from March 15, 1947, for costs of suit and general relief. [Tr. pp. 3-8 and 11-13.]

Answers to the complaints were filed on November 9, 1950. The answers admitted the payment of the taxes, filing of the claims for refund and that no refunds had been made. Otherwise, the answers denied the allegations of the complaints. [Tr. pp. 9-10 and 14-15.]

A Stipulation of Facts was entered into between the appellants and appellee and filed on April 2, 1951. [Tr. pp. 17-24.]

The two cases had been consolidated for trial on January 8, 1950, at the time the cases were set for trial. [Tr. pp. 15-16.]

After trial on April 3, 1951, the cases were submitted to Hon. Harry C. Westover, District Judge, principally

on the Stipulation of Facts and the exhibits attached thereto. [Tr. p. 16.]

Findings of Fact and Conclusions of Law were made and filed [Tr. pp. 28-32], and on June 7, 1951, judgment was entered for appellee to the effect that plaintiffs take nothing by their complaints and defendant recover its cost of suit. [Tr. pp. 32-33.]

Appellants thereafter moved to vacate the judgment [Tr. pp. 34-36], for a new trial [Tr. pp. 37-39], and for amendments to the findings. [Tr. pp. 39-45.]

All of the foregoing motions were denied by the Hon. Harry C. Westover, District Judge, on July 16, 1951. [Tr. pp. 45-46.]

Questions Involved.

The questions involved in this appeal are:

1. Was Judge Harry C. Westover, who presided at the trial of this action, disqualified to try the action or to render a judgment therein under the provisions of Section 455 of Title 28 of the Federal Judicial Code, so that appellant's motion to vacate the judgment should have been granted?

2. Are appellants subject to income tax for the year 1946 only upon that portion of the partnership net income of Le Roy D. Owen and William P. Neil, which was *distributed* or *distributable* to appellants during the year 1946?

3. What is the amount of the said partnership net income which was *distributed* or *distributable* to appellants during the year 1946?

Specification of Errors.

Appellants specify the following errors upon which they will rely in the prosecution of this appeal from the judgment of the District in this cause made and entered on June 7, 1951:

1. The District Court erred in denying appellant's motion to vacate the judgment. [Tr. pp. 45-46.] The trial judge was disqualified to rule upon the said motion.

2. The District Court erred in finding that $28,568.21 of the net income of the partnership was distributable to William P. Neil for the year 1946. [Finding V, Tr. p. 30.]

3. The District Court erred in concluding that the distributive share of William P. Neil in the "earned" income of the partnership for the year 1946 was $28,-568.21 and that appellants properly reported such sum as taxable income for the year 1946 under the provisions of Sections 180 to 183 of the Internal Revenue Code. [Conclusions of Law II, Tr. p. 31.]

4. The District Court erred in concluding that the income taxes for the calendar year 1946 were "properly" collected from appellants. [Conclusions of Law III, Tr. p. 31.]

5. The District Court erred in denying the motions for a new trial and to amend the findings. [Tr. pp. 45-46.]

ARGUMENT.

I.

The District Court Erred in Denying Appellant's Motion to Vacate the Judgment. The Trial Judge Was Disqualified to Rule Upon the Said Motion.

Title 28, Section 455, *Federal Judicial Code,* reads as follows:

> "Interest of justice or judge. Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal or other proceedings therein." (June 25, 1948, c. 646, No. 1, 62 Stat. 908.)

The foregoing section contains both a mandatory disqualification, and a discretionary disqualification. Even although the parties to the action attempt to waive the disqualification, there can be no waiver if the disqualification is based on absolute prohibition in a statute against a disqualified judge sitting in the case. (48 C. J. S. 1101.) The words of Section 455 cited above ("shall disqualify himself in any case in which he has a substantial interest, has been of counsel") are clearly mandatory, not discretionary. Up to the first word "or," Section 455 is mandatory; thereafter, it becomes discretionary in respect to leaving the decision to the trial judge as to whether his relation or connection to a party or his attorney renders it improper for him to preside in the trial of the action.

Referring to the assessment and collection of federal income taxes, Section 3641, *Internal Revenue Code,* states:

> "The Commissioner shall certify a list of such assessments, when made to the proper collectors, respectively, who shall proceed to collect and account for the taxes and penalties so certified."

At all times from July 1, 1943, to October 31, 1949, District Judge Harry C. Westover, who presided at the trial of this action, was the Collector of Internal Revenue for the Sixth District of California. [Stipulation of Facts V, Tr. p. 18.] Thus the judge who tried this case was the same person who, in his prior official capacity as Collector of Internal Revenue, was charged with the duty of collecting, and did collect, the very income tax assessments, upon the alleged overpayment of which appellants based these actions.

Therefore, Judge Harry C. Westover, as said Collector of Internal Revenue, had a "substantial interest" and had "been of counsel" in the assessment and collection of the income taxes to which these cases relate. He was an employee and agent of appellee in the assessment and collection of the said income taxes. Under Section 455 of the *Federal Judicial Code,* previously cited, the mandatory disqualification of the said trial judge to try the case, or to pass upon the motion to vacate the judgment, is apparent.

In the case of *United States v. Vasilick* (C. C. A. 3), 160 F. 2d 631, reversing 68 Fed. Supp. 725, it was held that where a district judge had been district attorney at the time of the trial and conviction of the defendant, he could not act as a judge on a motion to vacate judgment. As district attorney, he had been "of counsel" in all cases

in his district. His disqualification was not a matter for the *exercise of his own discretion* but was *unconditional and absolute.*

Appellants do not allege, and have not alleged, bias or prejudice upon the part of Judge Westover. But appellants do contend that his disqualification is mandatory under the terms of Section 455 of the *Federal Judicial Code, supra,* as enacted on June 25, 1948.

II.

The District Court Erred in Finding That $28,568.21 of the Net Income of the Partnership Was Distributable to William P. Neil for the Year 1946.

Section 182(c) of the *Internal Revenue Code* provides that:

> "in computing the net income of each partner, he shall include, whether or not distribution is made to him . . ."
>
> "(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183(b)."

The only distributions of income by the partnership to William P. Neil at any time were as follows [Tr. pp. 21-22]:

Date	Type and	Amount
September 11, 1946	Cash	$ 1,007.00
November 21, 1946	Cash	3,505.87
November 21, 1946	Stocks, at cost to partnership	23,358.59
	Total	$27,871.46

The foregoing amount of $27,871.46 was reported as net taxable distributive income of William P. Neil upon the partnership income tax returns filed in the Sixth District of California as follows [Tr. p. 20; Ex. 4]:

Year		Amount
1943	Loss,	$ 303.35
1944	Income,	1,809.14
1945	Income,	6,909.28
1946	Income,	19,456.39
	Total Net Income	$27,871.46

Appellants, it is true, erroneously reported as net income from the partnership upon their individual income tax returns for the year 1946 the sum of $28,568.21 and paid income tax thereon. [Tr. p. 18.]

However, the difference between the $28,568.21 of partnership net income reported by appellants and the amount of $19,456.39 shown in the table above and actually received by William P. Neil, which is $9,111.82, represents that portion of the partnership net income retained by Le Roy D. Owen, general partner, in Le Roy D. Owen Co. under a "claim of right," which theory of said Owen was upheld by the California Courts. [Ex. 5.]

During the year 1946, approximately 95% of the income of the partnership was from commissions on real estate sales. [Tr. p. 25.] Neither the partnership or Neil had a real estate broker's license, but Owen held an individual real estate broker license and transacted the partnership real estate business under such license. [Tr. p. 19.]

Section 10137 of the *Business & Professions Code* of the State of California states, in part:

> "It shall be unlawful for any licensed real estate broker to employ or compensate, directly or indirectly, any person for performing any of the acts within the scope of this Chapter who is not a licensed real estate broker, or a real estate salesman licensed under the broker employing or compensating him."

Section 10137 clearly ascribes to Le Roy D. Owen, as earned income, those real estate commissions constituting 95% of the partnership income in that it prohibits directly the sharing of such commissions by Owen with an unlicensed person (Neil).

The laws of California make it unlawful for any *person* to engage in the business of a real estate brokerage without first obtaining a California license. (*Bus. & Prof. Code,* Sec. 10130.) The word "person" includes a copartnership. (*Bus. & Prof. Code,* Sec. 10006.)

Should a licensed real estate broker engage in a joint venture or partnership with an unlicensed person, the licensed real estate broker may collect and retain the entire commissions earned by the two persons. (*Wise v. Radis,* 74 Cal. App. 765, 242 Pac. 90.)

In *Wise v. Radis,* it was held that an agreement of real estate brokers to carry on a joint venture and divide the profits constituted a "partnership." One commission was earned on January 10, 1922. Although plaintiff received his California real estate broker's license upon January 31, 1922, it was held that he could not recover from the defendant, a licensed real estate broker as of January 10, 1922, any part of the commission earned. The "partnership" was held to be an illegal one.

Judge Allen W. Ashburn, of the Superior Court of Los Angeles County, in awarding judgment to defendant in the case of *Neil v. Owen* [Ex. 6], stated that the case of *Del Rey Realty Co. v. Fourl,* 44 Cal. App. 2d 397, 403, 112 P. 2d 649, was most like *Neil v. Owen.* In the *Del Rey* case, an unlicensed real estate broker obtained an oil lease for defendant under a contract calling for a 10% interest in the sublease as compensation. A written instrument assigning the interest was delivered, but in a suit on this separate instrument, the court denied recovery, holding that the action was, in effect, to enforce the original illegal contract.

William P. Neil, not being a licensed real estate broker, and the partnership not being licensed, the conduct of the partnership under the license of Le Roy D. Owen constituted the performance of an illegal contract. Le Roy D. Owens, as the only licensed real estate broker, is the only one entitled to the commissions earned. Therefore, they are, and were, "distributive" only to Le Roy D. Owen.

In defendant's answer to the third amended complaint in the case of *Neil v. Owen,* as a second separate defense, defendant alleged as follows:

> "Plaintiff and defendant purported to enter into a real estate brokerage business and plaintiff failed to obtain a license from the State of California in accordance with the provisions of the laws of the State of California. That by reason thereof the alleged partnership between plaintiff and defendant was ille-

gal, contrary to and prohibited by law, and further, all moneys claimed due by plaintiff in his action are commissions earned as a result of real estate brokerage transactions. Defendant is prohibited by law from paying plaintiff, an unlicensed person, directly or indirectly, any of such commissions. By reason thereof plaintiff seeks the aid of this court in consummating an illegal transaction, and on grounds of public policy the court should leave plaintiff and defendant where it finds them." [Ex. 5.]

Where taxpayer receives earnings under claim of right and without restriction as to its disposition, he has received income which he is required to include in his income tax return, even though it may still be claimed that he is not entitled to retain money, and even though he may still be adjudged liable to restore its equivalent. (*United States v. Lewis* (March 26, 1951), 71 S. Ct. 522.)

Applying the ruling in the foregoing case, Le Roy D. Owen receiving the real estate brokerage commissions earned in his capacity as a licensed real estate broker, held such commissions under a "claim of right" as "Le Roy D. Owen, doing business as Le Roy D. Owen Company." [Tr. p. 19.] Therefore, he received commissions reportable upon his individual income tax return for the year 1946. William P. Neil did not receive such reportable commissions from the partnership, or Le Roy D. Owen, and the California Courts held that he could not maintain a suit against Le Roy D. Owen for the paying over of such commissions to him.

The "claim of right" interpretation of the tax laws has long been used to give finality to that period (annual accounting period), and is now deeply rooted in the federal tax system. (*United States v. Lewis, supra.*) The Supreme Court in the *Lewis* case also refers to cases collected in 2 *Mertens, Law of Federal Income Taxation,* Section 12.103. The *Lewis* case, and its implications, is discussed in Michigan Law Review, Volume 49, No. 8, page 1251 (June, 1951).

The Court below appears to have completely misinterpreted the *Lewis* case, as in the Opinion [Tr. p. 26] it is stated that "Income taxes must be paid on earned income." (*United States v. Ellis R. Lewis,* Sup. Ct. No. 347, October Term, 1950.) The *Lewis* case contains no statement of this obvious fact, which is not pertinent to this proceeding as the question herein is, actually, whether a particular segment of partnership income was "distributive" to Neil. (*Int. Rev. Code,* Sec. 182(c), *supra.*)

In *Reinschmidt v. Commissioner of Internal Revenue* (C. C. A. 5), 28 F. 2d 660, reversing the Board of Tax Appeals, Reinschmidt, a partner, entered income on his books in 1920, believing another partner had agreed to his receiving such income from a sale of partnership goods. In 1921, the other partners disclaimed having made such an agreement, and plaintiff adjusted his books accordingly. The Court held that plaintiff was not taxable on the income in 1920, never having received it and being unable to claim it.

In this proceeding, plaintiffs are in the same situation. Although they reported a certain share of the income of the partnership of Le Roy D. Owen in their 1946 individual income tax returns, it was not their "distributive" share of commissions earned by the partnership. They could not assert a claim to it as the California Courts held that it rightfully was earned by Le Roy D. Owen under the terms of his individual California real estate broker's license.

However, Le Roy D. Owen did turn over certain cash and securities to William P. Neil during the calendar year 1946. [Tr. pp. 21-22.] The partnership basis of these assets was reported as the distributive share of plaintiffs in the partnership income tax returns for the years 1943, 1944, 1945 and 1946. [Tr. p. 20.] As plaintiffs, after receiving such distributions held them under a "claim of right" (*United States v. Lewis, supra*), plaintiffs are subject to income tax upon these distributions in accordance with the portion of the partnership income allocated to William P. Neil as his share of ordinary net income in the partnership return filed for the calendar year 1946. [Ex. 4.] With respect to the remaining partnership income for the year 1946, the general partner, Le Roy D. Owen, has at all times held the assets representing such income in his possession, and the income, under a "claim of right." Therefore, Le Roy D. Owen is taxable upon his full distributive share ($44,263.28) of partnership income for the year 1946 [Ex. 4] and plaintiffs are taxable upon no portion thereof.

III.

The District Court Erred in Concluding That the Distributive Share of William P. Neil in the "Earned" Income of the Partnership for the Year 1946 Was $28,568.21 and That Appellants' Properly Reported Such Sum as Taxable Income for the Year 1946 Under the Provisions of Sections 180 to 183 of the Internal Revenue Code.

There is no dispute between the parties with respect to the "earned" income of the partnership for the year 1946, which was $63,719.67. [Tr. p. 20.]

The dispute relates to the distributive share of appellants in the said "earned" income of the partnership.

As a limited partner [Tr. p. 19], William P. Neil furnished the partnership capital [Tr. pp. 19-20], but could take no active part in the management of the business of the partnership. (*Calif. Corp. Code,* Secs. 15501-15531 (Uniform Limited Partnership Act).) The books and assets of the partnership were at all times in the custody of the only general partner, Le Roy D. Owen [Tr. p. 19].

Section 116(a)(3) of the *Internal Revenue Code* defines "earned income" as follows:

> "Wages, salaries, professional fees and other amounts received as compensation for personal services actually rendered."

This definition is similar to former Section 25(a)(4) of the *Internal Revenue Code* repealed by Section 107 of the *Revenue Act of 1943,* in connection with the repeal of the earned income credit. (5 *Merten's Law of Federal Income Taxation,* Sec. 32.05.)

Under the terms of the foregoing definition, no part of appellant William P. Neil's distributive share of the net income of the partnership during 1946 was "earned income" as to him.

The Court below appears to be confused as to the concept of "earned income." In the Opinion [Tr. p. 26], the statement is made that:

> "Income taxes must be paid on earned income (*United States v. Ellis R. Lewis,* Supreme Court No. 347)."

The foregoing statement is not disputed by appellants, but is wholly inapplicable to the facts of this case.

Judge Westover appears to have been misled by two principal factors in promulgating what, in the opinion of appellants, is an erroneous opinion. First, he misconstrued the decision in the case of *United States v. Ellis R. Lewis, supra,* and the implications of that decision. Second, he was misled by his erroneous conception of the phrase "earned income" as applied to federal income taxes.

The opinion below states, with respect to the "equities" [Tr. p. 27]:

> "Although we feel that the equities are with the plaintiffs in this action and they should not be called upon to pay tax on income which they did not actually receive or benefit from, nevertheless the law is well established that although income is not actually received, taxpayers are required to pay tax if the income is earned income."

Here again appears the phrase "earned income." Judge Westover now grounds his decision upon the phrase and his erroneous conception of it. Appellant William P.

Neil was taxable upon his "distributive share" of the net income of the partnership. (*Int. Rev. Code,* Sec. 182(c).) Whether such distributive share was "earned income" to him, or not, is wholly immaterial, but as a matter of income tax law, William P. Neil's "distributive share" of the partnership net income was wholly "unearned income."

IV.

The District Court Erred in Concluding That the Income Taxes for the Calendar Year 1946 Were "Properly" Collected From Appellants.

Here, Judge Westover concludes that the very income taxes which he, in his former capacity as Collector of Internal Revenue, collected from appellants were "properly" collected by him. However, as previously stated, he found the equities to be with appellants herein. [Tr. p. 27.]

In *Republic Oil Refining Co. v. Granger* (D. C. Pa., June 21, 1951), 98 Fed. Supp. 921, it is said:

> "The local rule will be followed whenever the applicability of a federal revenue statute is dependent upon fact which can be interpreted only in accordance with state rules of property.
>
> "A thing which is within the letter of statute imposing a tax is not within the statute unless it is within intention of congress."

Thus, the provisions of the *Business & Professions Code of California* applicable to this case cannot be ignored. Neither can it be inferred that the intention of Congress in enacting Sections 180 to 183 of the *Internal Revenue Code* was to levy an income tax on the partner

not receiving partnership income, instead of upon the partner receiving and retaining under the provisions of state law, the partnership income that is in issue here.

In *Alexander H. Kerr & Co. v. U. S. A.* (S. D. Calif. C. D., April 25, 1951), 97 Fed. Supp. 796, it is said:

> "The right to receive income, and not actual receipt, determines inclusion of an amount in gross income under accrual system."

Appellants herein under the laws of the State of California as interpreted by its courts, had neither the right to receive the income in issue here, nor did they ever receive it.

In *Alexander, et al. v. Commissioner of Internal Revenue* (C. C. A. 5, August 7, 1951), 190 F. 2d 753, the Fifth Circuit said:

> "The purpose of the revenue laws is the taxation of income to those who earn or otherwise create the right to receive it and enjoy the benefit of it when paid."

Appellants neither earned the income in question, had the right to receive it, or enjoyed the benefit of it.

A very recent case clearly interprets the rule set forth in *United States v. Lewis, supra,* relied upon by the Court below in its opinion, as follows:

> "A taxpayer, receiving earnings under claim of right without restriction as to disposition thereof, receives 'income,' which he must return for taxation, notwithstanding claim that he is not entitled to re-

tain money and possibility that he may be adjudged liable to restore its equivalent. *26 U. S. C. A.* 22(a), 42(a); *U. S. C. A. Const. Amend.* 16." (*Mutual Tel. Co. v. U. S. A.* (Sept. 28, 1951), 100 Fed. Supp. 164.)

The foregoing statement, as applied to the facts here, clearly charges Le Roy D. Owen with the income tax upon the partnership earnings he received, held under a claim of right, and successfully resisted the attempt of appellant Neil to take from him.

V.

The District Court Erred in Denying the Motions for a New Trial and to Amend the Findings.

Appellants believe that the foregoing arguments have previously covered this specification of error.

Conclusion.

For the foregoing reasons, appellants urge:

1. That the action of the District Court in denying appellants' motion to vacate the judgment be reversed and the case remanded to the District Court with instructions to grant a new trial before a District Judge other than Judge Harry C. Westover.

2. In the alternative, that the judgment of the District Court be reversed and the case remanded to the District Court with instructions to enter judgment in favor of appellants.

Respectfully submitted,

PRESTON D. OREM,
Attorney for Appellants.